REGISTRATION OF TITLE TO LAND.

I.

A RECENT article by Mr. H. W. Chaplin[1] has stated with great clearness and force the insecurity of our present method of transferring the title to land. The author, however, left to another the task of describing such a method of transfer as should be free from the defects he pointed out. The problem of a safer and more perfect system has lately been considered in several States. New York, Massachusetts, Illinois, Minnesota, Indiana, and probably other States, have appointed committees or commissions to consider the matter; and, except in New York, there seems to be a consensus of opinion that the "Torrens system" of registration of title, so called, can alone afford relief. Let me, then, briefly describe this system.

The essential feature of the Torrens system is this: that title to land passes only by the entry of the transfer upon an official register. A deed between the parties is entirely inoperative in so far as the legal title is concerned. Land, in fact, becomes as to its title entirely like stock in a corporation: it is transferable only on the official books. The owner of land shows his right, not by a deed from an individual grantor, but by a certificate of title issued to him by the official registrar of titles, in form a copy of the official entry, and in every respect like a certificate of stock. In order to transfer his title, the owner must bring or send to the registrar his certificate, which is then surrendered and cancelled; and after the proper entry on the register, a new certificate is issued to the transferee, certifying that the land now stands in his name on the register. The person in whose name the land stands on the register is the legal owner of the land; or, in less scientific, but no less accurate, language, the land always goes with the certificate.

For example, let us suppose that John Smith is the registered owner of a parcel of land, and that he wishes to convey it to Thomas Jones. He executes a deed of the land, as now, to Jones; but that does not pass title to the land. He gives Jones also his certificate of title. Jones goes with these two instruments to the

[1] Record Title to Land, 6 Harvard Law Review, 302.

registrar, surrenders the certificate, and delivers up the deed. Acting upon the authority of the deed, the registrar cancels upon the register the entry of Smith's title, enters upon another page the title of Jones, and issues a new certificate to Jones. The legal title is now in Jones. If Smith wishes to convey to Jones only part of his land, the surrender is made, the entry of title in Smith is cancelled as before, a new entry of title in Jones as to the portion conveyed is made, and a new entry is also made of title in Smith to the part unconveyed; and a certificate is issued to each, covering the land entered as his. The old certificate is thus exchanged for two certificates, which together cover the whole parcel.

If some legal estate in the land less than a fee simple is created, that fact is entered upon the official register and upon the certificate of the owner in fee, and the owner of the lesser estate also gets a certificate stating his right. A mortgage, for instance, is created by entry of the incumbrance upon the register and upon the owner's certificate, and a certificate of the mortgage is also issued to the mortgagee. An easement or a life estate is created in the same way. A mere equitable interest, however, is not so created; for the register purports to deal solely with the legal title. But one who has an equitable interest in land may prevent transfer of the legal title to a purchaser for value without notice, and in this way fully protect his right, by entering upon the register a *caveat*, or caution, setting forth briefly the nature of his claim. The legal owner may remove the *caveat* by litigating the question and obtaining a judgment in his favor, and, on the other hand, the claimant must take seasonable steps to enforce his claim. A legal lien upon land, such as an attachment, judgment lien, or mechanic's lien, is secured in the same manner; to wit, by entry upon the register of a claim, to be enforced or removed by subsequent proceedings.

The fact that the title to land is always in a registered owner makes a Statute of Limitations unnecessary; for as no party could acquire an apparent but invalid title to which after the lapse of time his right ought to be protected, the whole justification for a title by lapse of time is lacking. It is accordingly provided by the Torrens system that title by prescription shall be abolished. This at once puts an end to the acquisition of easements by prescription.

The devolution of land upon the owner's death is much sim-

plified. The certificate of title goes to a realty representative, appointed by the probate court, — usually the executor or administrator. After the estate is settled, distribution of the real estate to heirs or devisees is ordered by the court, and upon surrender of the old certificate by the realty representative, entry of title is made and new certificates are issued, according to the terms of the court's order.

Such in its general outlines is the Torrens system. There is no magic about the process by which it secures the land to the registered owner. It is not in any sense what it is sometimes called, — a system of guaranteeing titles. Neither the State nor any individual becomes a guarantor of possession to the certificate-holder; he keeps the land against all claimants because it passed to him by the entry on the register, and is therefore his land.

II.

One defect in the present record system pointed out by Mr. Chaplin is the possibility of fraud and personation; let us see how the difficulty is met under the new system. If it is proved that title has been entered in an innocent purchaser because of a forged deed and the surrender of the prior certificate, two courses are possible, and each is adopted in some jurisdictions that employ the Torrens system: the one course is to give the land to the holder of the new certificate; the other to give it back to the true owner. If the latter course is adopted, an exception is created to the general rule that the land follows the certificate; if the former, an exception is introduced to the principle of the common law that no innocent party shall lose a right because of a forgery. Injustice must, therefore, be done to one party, and this particular objection to the record system is not entirely removed; and in fact no system is conceivable in which loss by forgery and personation can be prevented. But it is possible to render fraud of this sort extremely difficult, and this is done by the Torrens system. Two important safeguards are introduced. First, the surrender of a certificate must be made; and to fulfil this requirement the forger must either get possession of the true certificate, or forge an instrument precisely like it. Second, the registered owner may, if he chooses, sign his name upon the page of the register that contains the entry of the land to him; and in that case the forgery must be so skilfully done as not to be discoverable upon comparison with the genuine signature. It is possible in such cases to com-

pensate the party who loses his land; and this is usually done. A certain small amount is paid on each transfer, which goes into a fund; and out of this fund any one who has lost his land without being chargeable with laches receives compensation.[1]

Another class of difficulties referred to by Mr. Chaplin arises upon the death of an owner of land, — doubts, namely, as to the true heir, or as to the validity of a partition among heirs, and title arising upon the production of a will after the lapse of years. These difficulties are cured, in the Torrens system, by the provision for a realty representative and final distribution by order of court. The acquisition of rights by prescription, as has been said, is impossible under the Torrens system, and thus a most annoying source of defect is removed. The interpretation of the description of land in a conveyance is a matter that cannot be made certain by any method of transfer. The most that can be done is to simplify the descriptions and make them as clear as possible. This is accomplished by the provision that each entry of title shall be accompanied by a plan; and in addition to this, the fact that the entries are indexed according to the location of the land also tends to secure accuracy.

The other defects pointed out by Mr. Chaplin fall into another class. They are due to informalities in the deed, to latent incapacity to convey, like insanity, or to estoppel by deed. Such defects disappear under the Torrens system. The conveyance is not effected by the deed, or by any act of the party, but by entry on the official register; and this entry has been regularly made. The former owner has therefore lost his land; and though he has a right to demand a reconveyance from his immediate grantee, this right does not affect a purchaser for value without notice. Nor is it just that it should. The hardest case is that of a lunatic; having made a conveyance while of unsound mind, he is properly allowed a right to attack the conveyance. But an innocent holder has at least an equal right, on grounds of natural justice, to keep the land. To give the land to either party deprives the other of it; and it is quite equitable not to allow the lunatic, by whose act the difficulty arose, a right to the land, but to remit him to his action *in personam* against the party who dealt with him. In this respect the result reached under the Torrens system is the juster one.

[1] This method is now in operation in England to indemnify persons to whom certificates of stock in a corporation have been issued by the corporation upon a forged power of attorney. 54 & 55 Vict. ch. 43.

Besides the dangers of defect in the title, stated by Mr. Chaplin, there are other serious objections to the present record system. Such objections are the expense of a fresh examination of title at each transfer; the delay in effecting a transfer, made necessary by this examination; the reduction in market value of land caused by this expense and delay; and the alarming multiplication of records, caused by the necessity of keeping in active use the records of all deeds from the first settlement of the country. "No way is perceived," says the Illinois Commissioners,[1] after stating these objections, "by which the present system can be retained, and these defects removed." But the Torrens system puts an end to them all.

This is not an untried system, nor is it, as has often been said, one which can be successful only in new countries. On the contrary, it has long been in use in several of the countries of Europe. Its history is briefly stated by the Illinois Commission:[2]—

"This system has been in operation for over a century in Prussia, Bavaria, and other European States, notably in Hamburg, where it has been used for upwards of six hundred years. It has been in use since 1858 in South Australia,[3] since 1861 in Queensland, since 1862 in Victoria and also in New South Wales, since 1863 in Tasmania, since 1870 in New Zealand and in British Columbia, since 1874 in Western Australia, since 1884 in Ontario, and since 1885 in Manitoba.

"So far as your Commissioners have been able to learn, the system has given general satisfaction to the landowners of every country where it has been tried. One country after another has adopted it, each with uniform success. Wherever it has been tried, it is in actual use to-day.

"In 1875 this system was put into operation in England; but a comparatively small part of landowners have as yet availed themselves of its benefits. The Register-General in England reports that the number of registered owners is steadily increasing, and that the manifest advantages of a registered title are gradually overcoming the deep-rooted opposition of the English landowner, to having his title a matter of public record."[4]

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[1] Report of the Land Transfer Commission, p. 2.

[2] Report, p. 3.

[3] Where it was introduced by Sir R. R. Torrens; hence the "Torrens system."

[4] The Commissioners seem to be in error in implying that the system has been in use in Prussia for a long period. It was introduced into that kingdom in 1872, after a

It may be proper to point out, to those who fear the possible effect of such a system upon the substantive law of property, the striking similarity of the Torrens system, so far as the passing of title goes, to the system of copyhold tenure in England. Holding by copy of court-roll and holding by certificate of entry in an official register are closely analogous. It may therefore console the conservative to reflect that the substantive law of property applied equally to land held in freehold and to land held in copyhold tenure, and that the almost entire absence from the reports of suits involving title to copyhold land shows that disputes as to the legal title of such land were extremely rare.

III.

I have not yet spoken of the subject which in discussions of the Torrens system is usually treated first; namely, the method of bringing about the change from the old ways to the new. It seems to me to be a subject of quite subordinate importance. If the result is desirable, we shall not be at a loss to devise means to reach it; while if the result is deemed disadvantageous, no means to it, however seductive, should sway our judgment and induce us to attempt it. The point to be determined, therefore, is not what method is best to bring about a registration of land-titles, but whether such registration is or is not desirable.

But though of subordinate importance, the question of method is in itself well worth considering; though it is of course impossible, within the limits of this article, to do more than state in outline the various plans proposed or in operation. These plans may all be resolved into two, — one looking to an immediate attainment of the new order of things; the other reaching it gradually, after a lapse of time. The former is the method in vogue in the Australian colonies, and may be called the Australian method; the latter is recommended by the Illinois Commission; and the English and Canadian Acts allow a choice of the two methods.

successful test in Rügen and Pomerania. "The practical results obtained in Prussia appear in some respects to be even better" than those obtained in Australia. See an article entitled "Registration of Title in Prussia," 4 Law Quarterly Review, 63. A somewhat similar system was in operation in the Netherlands before the time of Napoleon, and still exists in the Dutch settlements of South Africa. 2 Law Quarterly Review, 341. According to the method there prevailing, the deed is registered in court, and has the effect of a judgment *in rem*, — valid against all the world. The same method prevails in London, according to the custom of that city. Bohun, Privilegia Londini, 241.

The Australian method, then, contemplates the issuance to the applicant of a certificate which is from the beginning such a document as I have already described. The owner of land applies to the registrar to have his land entered in the official register, and at the same time brings in his title-deeds and other evidences of title. The title is thereupon examined by an official examiner, and if passed by him, the applicant is registered as owner. If the title is rejected by the examiner, the applicant is in some colonies allowed an appeal to a court of law; or the title is registered as subject to certain defects, and what is called a qualified certificate issued. If the absolute certificate is issued, the registered owner is henceforth the only legal owner; in short, the Torrens system is in full operation, so far as that land is concerned.

This method may evidently give rise to difficulty. In spite of the vigilance of examiners and the learning of courts, a certificate might be issued to applicant A, though the legal owner of the fee was in fact B; and B, not being a party to the proceedings, would not be concluded by them. Yet the certificate is conclusive, and the legal title now in A; what can be done? B may of course get the land from A, if he can; but it has probably been passed on to a holder for value. The only satisfactory remedy is against the State, whose officials have committed the error. Accordingly one whose land has been entered on the register to another's credit may recover its value from the State; and in order to indemnify the State, every applicant pays a certain percentage of the value of his land to an "assurance fund," from which such claims for loss of land are paid. Compensation to owners who have lost their land is therefore a necessary feature of this method; and an assurance fund is universally provided, though experience shows that demands upon it are extremely rare.

Where the other method of attaining the Torrens system is adopted, the applicant asks the registrar to enter upon the register merely the fact that he is seised of land claiming legal title. He is therefore required to prove only *bona fide* seisin; and upon proof of this a certificate is issued to him, expressly subject to all claims upon the land that existed at the date of the original entry of title. The certificate, in other words, confers upon the applicant no greater title than he previously possessed. The land is henceforth transferred according to the Torrens system; but instead of conferring absolute legal title, registration of ownership confers such title only as the first owner had. If at the time of the first

entry a paramount title existed, it is not at all affected by these proceedings.

This method, then, does not at once accomplish the desired result. It reaches the Torrens system only if the title is good at the time of the first entry, or afterwards becomes so. But the merit of the method is this, that it may be combined with processes already existing in the law to bring about the same result which is immediately but more violently reached by the Australian method. This possessory method, as it may be called, keeps the title as good as it was at the beginning; the proceedings mentioned in Mr. Chaplin's article, and especially the Statute of Limitations, finally perfect the back title. The Statute of Limitations makes a title good; the possessory method keeps it good; and the two combined result in a title as absolute as that obtained by the Australian method. This result is attained by a provision that no action for the recovery of land shall be brought by a paramount owner more than a specified time after issue of the possessory certificate. When that period has elapsed, the certificate becomes therefore absolute.

If the present Statute of Limitations were retained, the result would be deferred for twenty years or more; though meanwhile there would be considerable improvement on the present system. But so long a period is unnecessary in these days of steam and electricity; if twenty years was a just period a century ago, a much shorter time would not be unjust to-day. It is quite possible also to abolish the exceptions for disability in the statute, or at least those for absence and coverture.[1] The Illinois Commission recommend a five-year period of limitations, without exception for disability, giving the owner of a future interest a right, by filing a notice within five years, to bring suit upon the vesting of his cause of action. The result of their proposed method would be to make every certificate absolute in five years after the first entry of the land, unless meanwhile notice of an adverse future interest had been filed.

Certain advantages are gained by the adoption of the possessory method. There is no loss of title by mistake of the registrar, no action against the State, no need of an assurance fund, and no

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[1] In England, the period of limitation is now twelve years; the only disabilities are infancy, coverture, and lunacy; and thirty years is the utmost allowance for these disabilities. 37 & 38 Vict. ch. 57.

exhaustive examination of title. The expense of a first entry is therefore small. Another important consideration is this, that it is merely an extension of methods of dealing with land which are now in operation. On the other hand, the Australian method has the advantage, not to be lightly esteemed, of immediate and absolute certainty of title; and this advantage, in the minds of many eminent authorities outweighs all the others.

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